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COURT OF APPEALS  
DIVISION II

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NO. 42411-8-II

STATE OF WASHINGTON  
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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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THE BOEING COMPANY,

Petitioner,

v.

STATE OF WASHINGTON, POLLUTION CONTROL HEARINGS  
BOARD, and DEPARTMENT OF ECOLOGY,

Respondents.

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**PETITIONER'S REPLY IN SUPPORT OF MOTION FOR  
DISCRETIONARY REVIEW**

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## I. INTRODUCTION

This appeal involves the Industrial Stormwater General Permit (“ISGP”), which covers approximately 1,200 industrial facilities in Washington from January 1, 2010 to January 1, 2015. The Pollution Control Hearings Board (“PCHB” or “Board”) issued a certificate of appealability to enable direct review of this appeal pursuant to RCW 34.05.518.<sup>1</sup> The Department of Ecology (“Ecology”) filed a Response in opposition to Boeing’s motion for discretionary review. No other party has timely objected to direct review.<sup>2</sup> Boeing submits this Reply to Ecology’s Response.

## II. ARGUMENT

Boeing’s appeal raises three issues: (1) whether the PCHB’s rulings with respect to Condition S8.D of the ISGP are consistent with the statutory presumption of compliance with water quality standards set forth in RCW 90.48.555(6); (2) whether the ISGP effluent limitation for

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<sup>1</sup> See Boeing’s Motion for Discretionary Review, Appendix 1. As Ecology points out (Ecology’s Response at 2), the PCHB would not have granted direct review of the effluent limits for fecal coliform and total suspended solids if those were the only issues raised in this appeal. The PCHB’s view of those issues is based upon the PCHB’s mistaken assumption that Boeing’s challenge to these effluent limits does not raise an issue of statutory construction. See Boeing’s Motion for Discretionary Review at 16 n.13 and 19-20. Nevertheless, because the PCHB determined that Boeing’s challenge to the PCHB’s interpretation of the presumption of compliance in RCW 90.48.555(6) is appropriate for direct review, the Board issued a Certificate of Appealability for this entire appeal.

<sup>2</sup> The Copper Development Association, Inc. filed a timely response in support of direct review. On September 1, 2011, Arthur West filed an “Objection to Motion for Discretionary Review” in this Court. Pursuant to the Court’s August 16, 2011 letter to the parties, Mr. West’s objection is untimely.

sediment contamination, expressed as total suspended solids (“TSS”), was appropriately derived under RCW 90.48.555(7); and (3) whether the ISGP effluent limitation for fecal coliform was appropriately derived under RCW 90.48.555(7). Ecology’s Response mischaracterizes the impact of the ISGP and obscures the importance – to Boeing, other dischargers, and the public – of these issues. This appeal meets the criteria for direct review by the Court of Appeals pursuant to RCW 34.05.518.

**A. Delay In Obtaining a Final and Prompt Determination of the Issues In This Appeal Would Be Detrimental to Boeing, to Other ISGP Permittees, and to the Public Interest.**

Ecology states that Boeing “was the only permittee to appeal the Permit” (Ecology’s Response at 1) in an attempt to downplay the importance of resolving this appeal, and characterizes as “speculative assertions” (Ecology’s Response at 4-5) Boeing’s concerns about the effects of prolonged litigation over the ISGP through the superior and appellate courts. However, Ecology does not dispute that Boeing operates facilities on over 3,000 acres subject to the ISGP. Ecology does not dispute that none of the stormwater treatment technologies thus far approved by Ecology can consistently reduce copper concentrations below the ISGP’s “benchmark” values, and that Boeing will face substantial costs for stormwater treatment to remove copper in an effort to comply with ISGP Condition S8 as the PCHB has interpreted it. Ecology does not dispute that it has already identified four existing Boeing facilities that

discharge stormwater to water bodies that are “303(d)-listed” for fecal coliform bacteria, and one Boeing facility that discharges to a water body listed for sediment contamination (i.e., subject to the ISGP’s effluent limit for TSS).<sup>3</sup> Nor does Ecology dispute that Boeing faces the threat of enforcement liability if it cannot comply with the ISGP’s effluent limits for TSS or fecal coliform.<sup>4</sup> Nor does Ecology dispute that it will be practically impossible for Boeing to prevent birds (a primary source of fecal coliform bacteria) from defecating at its facilities. These facts were before the PCHB when it issued the Certificate of Appealability in this matter.

Nor does Ecology dispute that Boeing, other industrial dischargers, and the public will be harmed by prolonged uncertainty regarding the specific standards and requirements for stormwater treatment at facilities covered by the ISGP. As the PCHB recognized in an appeal of a previous iteration of the ISGP, industrial dischargers, environmental organizations, and the public all need “to know the appropriate level of control or treatment of the discharge of stormwater required of industry.” *Washington Dept. of Ecology v. Pollution Control Hearings Board*, Thurston County Superior Court No. 03-2-01754-7, Certificate of

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<sup>3</sup> For the ISGP’s list of these specific Boeing facilities, see Motion for Discretionary Review, Appendix 7.

<sup>4</sup> In fact, Ecology specifically concedes that “violations of a discharge permit are always subject to enforcement liability” (Ecology’s Response at 4).

Appealability, 2003 WL 22521246 (October 27, 2003), at 2.<sup>5</sup> Here, prolonged uncertainty over the requirements of the 2010 ISGP, a permit affecting approximately 1,200 industrial facilities, would have the same detrimental impact on industry and the public interest.

By objecting that “almost any pollution discharge permittee will be able to demonstrate detrimental delay” (Ecology’s Response at 5), Ecology implicitly acknowledges the detrimental impacts of such uncertainty, the costs of unnecessary stormwater treatment, and the exposure to enforcement liability for inability to comply with inappropriate permit provisions if this appeal is not promptly resolved by the appellate courts.

Dismissing these concerns as “speculation”, Ecology is really arguing only about the level of proof necessary to satisfy the criteria in RCW 34.05.518(3)(b). Ecology does not contend that these impacts would not be detrimental, or that they are not likely to occur. Instead, Ecology suggests that Boeing has failed to prove that these impacts will occur. Ecology’s argument implies a requirement that does not exist in the criteria for direct review; RCW 34.05.518(3)(b) does not establish

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<sup>5</sup> The only difference between the prior ISGP appeal and this appeal is that *Ecology* was an appellant in the prior appeal; Ecology supported direct review in the hope of obtaining prompt reversal by the court of appeals of portions of the PCHB’s decision. Now that the shoe is on the other foot, Ecology is apparently determined to delay a final determination of the issues as long as possible – potentially until the ISGP expires at the end of 2014, at which point Ecology will no doubt argue that these issues are moot.

such a burden on a party seeking direct review.<sup>6</sup> Boeing seeks direct review in an effort to *avoid* the detrimental impacts entailed by delay in resolving this appeal over the ISGP – a permit that affects Boeing facilities on over 3,000 acres.

Boeing is sufficiently adversely affected by the ISGP to have appealed the permit to the PCHB, to have initiated judicial review of the PCHB’s decision, and to have requested prompt appellate resolution by this Court. If Boeing’s concerns about stormwater treatment costs and the threat of enforcement liability under this permit are *not* sufficient to support a finding of detrimental delay under RCW 34.05.518(3)(b), what litigant would ever be able to demonstrate the appropriateness of direct review under that statute?

**B. This Appeal Raises Fundamental and Urgent Statewide Issues.**

Ecology’s argument about the significance of the issues in this appeal is equally meritless. Ecology suggests that the issues in this appeal are irrelevant to all other ISGP permittees because “Boeing was the only ISGP permittee to appeal the ISGP” and other permittees “are willing to accept the ISGP as drafted.” (Ecology’s Response at 5-6.) Nothing in the APA suggests that the number of appellants is determinative of whether

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<sup>6</sup> Similarly, Ecology’s reference to “the important screening function the legislature intended” when it enacted RCW 34.05.518 (Ecology’s Response at 5) is unsupported by any citation to authority.

the issues are fundamental and urgent. Moreover, the notion that all other ISGP permittees are perfectly happy with the permit is nothing more than wishful thinking on Ecology's part.<sup>7</sup> Only one permittee – Weyerhaeuser – intervened in the PCHB proceeding to defend the permit as drafted.<sup>8</sup> Other ISGP permittees will be significantly affected by the outcome of this appeal.

Ecology's Response also confuses the question whether this ISGP appeal raises fundamental and urgent statewide issues with the issue of whether other ISGP permittees share Boeing's view of the permit's TSS effluent limit (Ecology's Response at 6-7). Ecology argues that the ISGP's approach to sediment contamination is better for other permittees (*see id.*); but that is really an argument on the merits about whether the TSS limit was "appropriately derived" under RCW 90.48.555(7). It simply begs the question of the importance of these issues to industrial dischargers. Significantly, Ecology's Response ignores entirely the ISGP's fecal coliform effluent limit and the problems it poses for industrial facilities that have no legal or practicable means of preventing

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<sup>7</sup> Rather than being "willing to accept the ISGP as drafted," other ISGP permittees are more likely willing to allow Boeing to shoulder the substantial expense of pursuing this appeal – including, for example, the cost of responding to Ecology's continued insistence on multiple layers of repetitive appellate review in the superior and appellate courts even in the face of the PCHB's conclusion that direct review should occur here.

<sup>8</sup> Using Ecology's reasoning, only one permittee out of 1,200 actually supports this permit.

birds from defecating on their property. Boeing is surely not the only industrial employer whose facilities can be overrun by Canada geese.

Ecology concedes that this appeal is “undoubtedly important to Boeing” (Ecology’s Response at 7). The fact that the largest industrial employer in the state is pursuing this appeal of the ISGP ought to underscore the statewide importance and urgency of resolving these issues.

**C. This Proceeding is Likely to Have Significant Precedential Value.**

Ecology makes light of the significant precedential value of an appellate court interpretation of RCW 90.48.555(6), based upon Ecology’s disagreement with Boeing’s interpretation of the statute (Ecology’s Response at 8-9). The “straightforward legal exercise” (*see id.* at 9) of interpreting a statute that has not yet been addressed by an appellate court always has precedential value. Here, its significance is inherent in the extremely broad reach of the permit at issue. Ecology’s dismissive approach to RCW 90.48.555 notwithstanding, the proper application of the statutory presumption of compliance with water quality standards is a question of first impression that is certainly significant to all permittees subject to the ISGP. Ecology’s explanation of its view of the presumption of compliance serves only to underscore the dramatic differences between

the parties' interpretations of the statute, and the need for timely resolution by this Court.

Boeing's position is that the statutory presumption of compliance in RCW 90.48.555(6) places meaningful limits on Ecology's authority to impose stormwater treatment requirements in the ISGP.<sup>9</sup> Regardless of the outcome of this appeal, resolution of the issue whether a statutory presumption of compliance with water quality standards can be eviscerated by Ecology's circular application of the "full compliance with all permit conditions" language in RCW 90.48.555(6) is likely to have significant precedential value.

Whether Ecology may in effect pull a numeric effluent limit out of thin air and call it "appropriately derived" under RCW 90.48.555(7) is also an issue with significant precedential value. Ecology's Response fails to recognize that, in addition to a "fact specific analysis of whether two particular effluent limitations were appropriately derived" (Ecology's Response at 10), Boeing's challenge to the TSS and fecal coliform effluent limits raises the broader question of whether and to what extent a numeric effluent limit must have a legitimate scientific or technical basis in order to be considered "appropriately derived" under RCW 90.48.555(7). An

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<sup>9</sup> Ecology's purported quotation of what "Boeing has consistently argued" does not accurately describe Boeing's argument; it is actually the *PCHB's* characterization of Boeing's argument. See Ecology's Response at 8.

appellate court determination of whether an explicit legislative directive can be presumed satisfied through “deference” to Ecology – as the PCHB did here – will have significant precedential value.

The fact that RCW 90.48.555 is presently due to sunset on January 1, 2015 – the expiration date of the ISGP – does not affect the precedential value of an appellate court ruling on these issues. The Court should presume that Ecology will issue many more iterations of the ISGP.<sup>10</sup> As the sunset date of RCW 90.48.555 approaches, the Legislature will no doubt consider whether to extend, revise, or allow expiration of the statute.

Appellate court interpretations of statutes “form the background against which the Legislature acts.” *City of Seattle v. McKenna*, \_\_\_ Wn.2d \_\_\_, 2011 WL 3849524 (September 1, 2011) at 6. Resolution of this appeal will inform the state’s overall stormwater regulatory scheme now and in the future. Whether the Court agrees with Boeing that a regulatory agency may not promulgate permit terms that directly contravene a statutory presumption of compliance, or agrees with Ecology that a statutory presumption can be rendered meaningless by the Legislature’s simultaneous requirement of “full compliance with all permit conditions”, this proceeding is likely to have significant precedential

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<sup>10</sup> Indeed, Ecology is presently undertaking a modification of the ISGP in response to the PCHB’s remand of specific conditions. *See* Motion for Discretionary Review, Appendix 2 at 73.

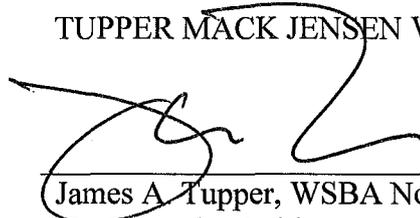
value. Similarly, whether the Court agrees with Boeing that a legislative direction to impose “appropriately derived” effluent limits places a reasonable limit on the agency’s discretion, or agrees with the PCHB that Ecology has carte blanche to devise effluent limits, this proceeding is likely to have significant precedential value.

### III. CONCLUSION

For the reasons set forth in Boeing’s motion for discretionary review and the foregoing reply, the Court should reject Ecology’s arguments and accept direct review of this appeal.

RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of September, 2011.

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CERTIFICATE OF SERVICE

I certify that on September 6, 2011, a copy of the foregoing Petitioner's Reply in Support of Motion for Discretionary Review was e-mailed and mailed, postage prepaid, to the following:

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